THE COURTS OF PENNSYLVANIA IN THE EIGHTEENTH CENTURY PRIOR TO THE REVOLUTION.

In 1701 William Penn was called back to England to defend his proprietorship. Before his departure a general revision of the earlier legislation was undertaken at the sessions of the assembly held at New Castle in 1700 and at Philadelphia in 1701. The acts there passed, one hundred and fourteen in number, seem, in a sense, to have been regarded as supplying the previous legislation and were passed with the expectation of being presented to the privy council for approval, as required by the charter. In fact, when the board of trade inquired of Penn, on his return, as to whether the laws received from him were a complete body of all the laws of the province, he replied that he believed they were the present body of laws, and it will be noticed that the digests of the eighteenth century begin their compilations with the Acts of 1700.1

Among these acts was one of October 28, 1701, entitled “An Act for Establishing Courts of Judicature in this Province and Counties Annexed.”2 Its origin was as follows: Edward Shippen, for the two previous years chief justice of the provincial court, and John Guest, the then chief justice, both members of the council, brought into the assembly on October 7th, a bill for establishing the courts, which was “unanimously rejected.” Some few days after, David Lloyd, who was not then a member of either council or house, proposed a bill which was voted to be adopted with amendments, and Richard Hallowell and Isaac Norris were appointed a committee to draw up the bill, with the amendments. The bill met with no apparent opposition in the council. Without repeating its provisions in full, which would be tedious, it may be said by way of summary that

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1 II Stat. at Large, 462.
2 II Stat. at Large, 148; Charter and Laws, 311.

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the act provided for the holding of the "County Courts or Sessions" at stated periods, three justices to constitute a quorum, with jurisdiction in civil and criminal matters, capital cases excepted. Maritime affairs, not cognizable in the admiralty courts, were to be tried in a special manner. The county courts also received equity powers, with the right of appeal to the provincial court. The provincial court was to consist of five judges, appointed by the governor, three of whom were required to sit twice a year in Philadelphia, and two, at least, to go on circuit through the counties to try capital cases and serious crimes and hear appeals from the county courts. The practice on writ of error was regulated, and provision made for appeals to the king. The powers and duties of the orphans' courts were also better defined and the forms of certain writs prescribed; all former laws relating to the courts were repealed.

In its main outline the act presented the system of judiciary then, and afterwards, recognized by the colonists as the most convenient for Pennsylvania, but in the form adopted, it did not prove acceptable to the advisers of the crown. Penn himself seems, on second thought, to have found some objectionable features in the act and desired that it might not be confirmed but sent back to be amended. The lords commissioners for trade and plantations reported that the act, "so far from expediting the determination of law suits," would, as they conceived, "impede the same," and, accordingly, the act was formally disallowed and repealed on February 7, 1705, by the queen in council.

One of the objections that occurred to the minds of the English lawyers was to that clause which directed that the practice, while following that of the common pleas of England, should keep to plainness and verity, and avoid all "fictions and colour in pleadings." A doubt was entertained as to whether this might not preclude an action of ejectment. In this they were not far from the real purpose of the draughtsman of the act, as would appear from a debate in the provincial council in December, 1704, upon a petition

*II Stat. at Large, 440.*
by Thomas Revel, the plaintiff in an ejectment, who complained that his case had been put off for nearly three years. John Moore, counsel for the plaintiff, and David Lloyd, for the defendant, being summoned before the council, Lloyd boldly argued that that method of trial being fictitious, was repugnant to the law of the province. Lloyd, however, was clever enough at a later day, to use the action of ejectment with success in the Frankfort Company’s case, which will be referred to hereafter.

The repeal of the Act of 1701 left the administration of justice in a confused state. There had been some debate in the session of the assembly of 1705 upon the subject of courts, but the repeal of the act was not known. Upon receipt of the order in council, Governor Evans called the assembly in special session, in September, 1706, and presented to that body an act for establishing courts, drawn up, it was said, by some practitioners therein. The assembly, however, requested that the matter be referred to the new house, which met in October, 1706, and accordingly at the following session this was the first matter under discussion, the governor laying his bill before the house with his opening address. The assembly, however, had other views and presented them in what is described as a “long and tedious bill,” which, on being read in council, was found to disagree very widely from the plan proposed by the governor’s advisers.

We have not the text of these rival bills, which brought about a complete deadlock between the governor and the house, but as far as can be ascertained from the respective criticisms, the house objected to the governor’s bill as tending to increase the power of the governor, council and provincial judges at the expense of liberty (there was a provision for a court of equity to be held by the governor). While, on the other hand, the governor attacked the assembly’s bill (undoubtedly the work of David Lloyd, the

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*II Col. Rec., 185, 19/11/1704.
*II Col. Rec. 261, Sept. 16, 1706.
*II Col. Rec., 271, 14/9/1706.
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speaker), on the ground that it went into matters of practice at great length, which ought to be settled by rule of court; that it provided for the removal of the judges on address of the assembly; that the provision for the salaries of judges was utterly insufficient; that there should be a separate court of equity held by the governor and council and not by the county courts; and that the provision applying the fines and forfeitures to the support of the courts infringed on the rights of the proprietor. It is apparent that governor and assembly were struggling for the control of the courts and in view of the expected surrender of the government to the crown, both sides were equally anxious to establish their position before that event.

Conferences were held and bitter language used, the matter ending in a personal controversy between the hot-headed young governor and the equally fiery speaker, when the latter declined to rise when addressing the governor at one of these conferences. The assembly then proceeded to impeach James Logan, the secretary of the province, charging him with attempting to subvert the charter and set up arbitrary government. The governor, having twice adjourned the courts pending the discussion and now despairing of reaching a conclusion, issued an ordinance, by authority of a clause in Penn's charter, for the establishment of the courts.\(^7\) In this ordinance the provincial court is first called the "Supreme Court" of Pennsylvania. The assembly prepared a bitter remonstrance against the ordinance and adjourned.

Under this ordinance, which embodied the undisputed features of the proposed bills in a clear and concise form, the courts acted during the remainder of Evans' and the first two years of Gookin's administration, until, in 1710, tired of quarrelling over non-essentials, a court act was passed.\(^8\) By this act a court, called the "Supreme Court of Pennsylvania," was established, consisting of four judges appointed by the governor, two to constitute a quorum, with

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\(^7\) II Stat. at Large, 500.

\(^8\) Feb. 28, 1710-11, II Stat. at Large, 301.
power to hear appeals at law or in equity. The jurisdiction and practice of the quarter sessions and common pleas were elaborately defined and Governor Evans' ordinance was followed in the provision that all capital offenses should be tried before commissioners of oyer and terminer specially appointed for the occasion. This long, complicated, but interesting act would seem to have aimed at establishing a complete system of legal practice peculiar to the province, and in this respect it may be regarded as expressing the views of David Lloyd's party. By a fee bill adopted the same day, the chief justice was allowed thirty shillings and the other justices twenty shillings for every day they sat in court. Both of these acts were repealed by the queen in council on February 20, 1713, by advice of the solicitor general, Sir Robert Raymond, who was of the opinion that the practice provided would multiply trials at law in plain cases and make proceedings in law and equity insufferably dilatory and expensive.

The assembly had, however, hit upon a method of preserving its legislation, temporarily at least. Under the charter, all laws were to be submitted to the council within five years of their enactment. The colonists took as much time as they possibly could before submitting the acts, and, as a result, the acts generally remained in force nearly five years, and when the assembly was notified of their repeal, new acts on similar lines were passed. Against such tactics the Committee on Trade and Plantations vainly protested. During the intervals between the repeal of the old and the passage of the new court acts the governor maintained the courts either by special commissions to the members thereof, or by general ordinances. The latter method the assembly regarded as an infringement on their rights.

One act did succeed in obtaining favorable recommendation, that of March 27, 1712-13, relating to the organization of and powers of orphans' courts, a comprehensive statute which defined the duties of that court in relation to the estates of decedents, and the care of the estates of minors,
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and became the basis of all subsequent legislation extending and strengthening the jurisdiction of that admirable tribunal.

It would take up too much space to go over all the acts that fell before the criticisms of the council. One, that of May 15, 1715, regulated the taking of appeals to Great Britain and required the appellant to give recognizance in double the amount of the judgment. The objection to this act was that there was no sum limited for which an appeal might be brought, as provided in the instructions to the governors of all the plantations, but notice of this repeal does not seem to have reached Pennsylvania, and the act was printed as in force in all revisions of the laws down to the revolution. The first definite reference to these appeals is in the commission of William and Mary to Governor Fletcher, which limited appeals to cases involving more than three hundred pounds. Additional instructions were sent to the respective governors in 1726, directing the suspension of execution pending appeals, but there is little light to be thrown on this subject from our own public documents. In 1718 two murderers, Hugh Pugh and Lazarus Thomas, attempted to gain a reprieve by an appeal to the king, but the council ignored their petition on account of the notoriety of their crimes. The case of Fothergill v. Stover, 1 Dall. 9 (1767), involving the admissibility in evidence of a letter from the secretary of the land office to a deputy surveyor, is said by the reporter to have been affirmed on appeal to the king. It is interesting to note, that to the appeals from the various provinces and from the Channel Islands is to be traced the jurisdiction of the Judicial Committee of the Privy Council. The standing committee for trade and plantations, constituted in 1667, was by an order of 1691, directed to hear appeals and report thereon to the king in council. Few cases came before the committee at first, but gradually their proceedings took on the form of a judicial tribunal, the judgment of the members became a

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III Stat. at Large, 32.

judicial decision, and the adoption of their report a *pro forma* matter. At this early period, however, their decisions are but occasionally noticed in the English reports.

The attempted appeal of Pugh and Thomas was based on the fact that seventeen of the grand jury which had indicted them and eight of the petty jury who found them guilty were Quakers who had qualified by affirmations instead of oaths. This brought to the front a difficulty that had long troubled the colony. The conscientious scruples of the Quakers against judicial oaths had been taken advantage of by their opponents of other denominations, led by Colonel Quarry, to drive them from office and lessen their power. An order had been procured from Queen Anne enjoining the administration of oaths to all persons willing to take them, an order which the Quaker justices were loath to enforce, while the justices of the church party declined to administer affirmations, lest they should mistake the sincerity of the affiant's religious scruples. Constant friction and mistrials resulted from this state of affairs, and more than one act was passed on the subject only to meet with technical objections in England.

The popularity of Governor Keith enabled him to execute a remarkable coup in the passage of the Act of May 31, 1718, which permitted affirmations by such as conscientiously scrupled to take an oath, but at the same time restored much of the rigorous criminal code of England, which the humanity of Penn had prevented from being put in force in the province. The sacrifice of the mild code, in return for the right of affirmation, was accepted and the act was approved by the crown.

From this time capital punishment for the greater felonies was rigorously employed, until in 1794, principally through the efforts of Judge Bradford, the death penalty was abolished in all cases except high treason and wilful murder. With the passage of the Act of 1718 the number of appeals for executive clemency steadily increased and the minutes

12 III Stat. at Large, 199.
of the council are full of such petitions. One of the most curious is the following: 13

"A Petition of John Remington, Attorney at Law, delivered to the President, was by him laid before the Board and read, setting forth that the Petitioner was unfortunately deluded & drawn into the idle Diversion of performing the Ceremony of making a free Mason, in Order to which a Sport called Snap Dragon was prepared, at which the Petitioner was persuaded to be present; that unhappily some of the burning Spirit used in this Sport was thrown or split on the Breast of one Daniel Rees, which so burnt or scalded him that in a few days after the said Daniel dyed; That Doctor Evan Jones had been indicted as Principle for the Murder of the said Daniel Rees, & by a Jury of the County was found guilty of Manslaughter; That the Petitioner was also indicted as aiding & abetting the said Evan Jones, and altho' no Evidence did or could appear to prove that the Petitioner had any hand in the throwing or spilling the said Liquor on the Body of the said Daniel, or was privy to any Design or Intention of doing harm to the said Daniel, or to any other Person, yet the same Jury had brought in a Verdict of Manslaughter likewise against the Petitioner, which if put in Execution would tend to the utter Ruin of the Petitioner, his Wife, and two small children, & therefore humbly praying that the President & Council would be pleased to grant him a Pardon; Whereupon the Board are of Opinion that the Petitioner should be pardoned the Manslaughter aforesaid, and the burning in the hand, which by reason thereof, he ought to suffer; But it being observed that in the Course of the Tryal a certain wicked & irreligious Paper had been produced & read, which appeared to have been composed by the said Remington, who had made the aforesaid Daniel Rees repeat the same, as part of the form to be gone thro' on initiating him as a free Mason; the Board therefore agreed that the Pardon should be so restricted as that it might not be pleaded in Bar of any Prosecution that should hereafter be commenced against the said Remington on account of the said scandalous Paper."

It would seem that with the constantly increasing population, a disorderly element was introduced into the community that rendered stringent measures necessary for the protection of society. In the newspapers will be found complaints against the authorities in England for making the colony a dumping ground for criminals and vagabonds. In 1717 the grand jury present:

"Whereas, it has been frequently and often presented by several former grand juries for this city, the necessity of a ducking stool and house of correction, for the just punishment of scolding, drunken women, as well as divers other profligate and unruly persons in this place, who are become a public nuisance to the town in general; therefore, we the present grand jury, earnestly again present the same to

13 IV Col. Rec., 276, Feb. 3, 1737-8. A full report of this affair will be found in the Penna. Gazette, Feb. 7, 1737-8, by which it appears that the parties concerned were not Free Masons, but practical jokers.
this Court of Quarter Sessions, desiring their immediate care; that those public conveniences may not be longer delayed, but with all possible speed provided for the detection and quieting such disorderly persons." And a few years later, a second inquest, "taking in consideration the great disorders and the turbulent behaviour of many people in this city, present the great necessity of a ducking-stool for such people, according to their deserts."

There are many indictments for forestalling the markets and regrating, offences against public trade that excited in that day the popular attention now centered on rebates and trusts.

In 1731 an execution took place at New Castle which, it is to be hoped, was exceptional in the annals of the colonies. Catherine Bevan, together with a servant named Peter Murphy, were indicted, tried and found guilty of the murder of the woman's husband, Henry Bevan. The conviction would seem to have been obtained principally upon the confession of the servant. By the common law at that time the murder of a husband by his wife was petit treason, and the punishment was to be drawn and burned. Accordingly, on September 10, 1731, the man was hanged and the woman burnt pursuant to their sentence. A gruesome account of the affair appears in Franklin's "Pennsylvania Gazette" for September 23, 1731:

"She deny'd to the last that she acted any part in the murder and could scarce be brought to own that she was guilty of consenting. Neither of them said much at the place of execution. The man seemed penitent but the woman appear'd hardened. It was designed to strangle her dead before the fire coulu touch her; but its first breaking out was in a stream which pointed directly upon the rope that went round her neck, and burnt it off instantly so that she fell alive into the flames, and was seen to struggle."

To return to the courts. At a meeting of the council held on November 9, 1719, Governor Keith called attention to the repeal of the several acts relating to courts, and proposed that the board consider the best means of meeting the inconvenience caused thereby. The consensus of opinion was that the governor should issue special commissions authorizing the justices to hold court on the days when

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they should be held under the repealed laws. Similar action was taken in the following March in reference to the supreme court, and David Lloyd, who was now chief justice, prepared the forms of commission. In this way the courts were continued until at a meeting of the council, May 12, 1722, it was observed that the courts would be "more regularly and effectually established by ordinance, as they are done in some of our neighboring governments, than by any particular Commissions," and it was recommended that the matter be brought to the attention of the House of Representatives. A bill was promptly passed and messaged to the council, where it was referred to Richard Hill, Isaac Norris, James Logan and the attorney general, Andrew Hamilton, for amendment. The bill as amended was returned to the house, and on May 22, 1722, became a law.15

This act apparently was never considered by the crown, but, in some manner, was allowed to become a law by lapse of time, according to the charter. The reason for its escape lies probably in an oversight of the clerks of the council rather than in any intention on the part of the board to give it even a tacit approval. The act appears in a list, under consideration by the board of trade in 1739, which the lords commissioners could not find to have been ever approved.16 Mr. Paris, the agent for the colony, after tedious searches, found some of these acts "laid up in a by corner of the Board of Trade and covered very thick with dust." In the list the act we are discussing is marked "supplied." As a matter of fact, three months before the time for its consideration had expired, the act had been supplied by the Act of August 27, 1727,17 which was repealed by order in council September 21, 1731. In repealing the latter act, the point seems to have been overlooked that the Act of 1722 was revived by the repeal, and the question of the crown's power to pass upon it then was not raised.

Upon the repeal of the Act of 1727 a special session of

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15 III Stat. at Large, 488.
16 III Stat. at Large, 488.
17 IV Stat. at Large, 84.
the assembly was called, and an act passed formally reviving the Act of 1722 (Act of November 27, 1731, IV Stat. at Large, 229). This reviving act seems to have been allowed to become a law by lapse of time. Mr. Fane, the king's counsel, to whom it was referred by the lords commissioners, saw no objection to it. The Act of 1722, which in many of its provisions remained in force until after the revolution, provided for county courts of quarter sessions, composed of justices appointed by the governor, and for county courts of common pleas to be held four times a year by justices, also appointed by the governor, with authority to hold pleas of assizes, scire facias, replevins and all manner of actions, civil, personal, real and mixed, and to grant writs of partition and writs of view.

As to the supreme court, the act provided as follows:

"And be it further enacted by the authority aforesaid, That there shall be holden and kept at Philadelphia a court of record twice in every year: (That is to say) on the twenty-fourth day of September and the tenth day of April, if the same days, or either, do not happen to be the First day of the week; and in such case the said court shall be held on the next day following; which said court shall be called and styled the supreme court of Pennsylvania. And that there shall be three persons of known integrity and ability, commissionated by the governor, or his lieutenant for the time being, by several distinct patents or commissions; under the great seal of this province, to be judges of the said court, one of whom shall be distinguished in his commission by the name of chief-justice. And every of the said justices shall have full power and authority, by virtue of this act, when and as often as there may be occasion, to issue forth writs of habeas corpus, certiorari and writs of error, and all remedial and other writs and process, returnable to the said court, and grantable by the said judges by virtue of their office, in pursuance of the powers and authorities hereby given them.

Provided always, That upon (any) issue joined in the said supreme court, such issue shall be tried in the county from whence the cause was removed, before the judges aforesaid, or any two of them, who are hereby empowered and required, if occasion require, to go the circuit twice in every year, * * * * and to do generally all those things that shall be necessary for the trial of any issue, as fully as justices of nisi prius in England may or can do.

And that the said judges, or any two of them, shall have full power to hold the said court, and therein to hear and determine all causes, matters and things, cognizable in the said court, and also to hear and determine all and all manner of pleas, plaints and causes, which shall be removed or brought there from the respective (general) quarter-sessions of the peace and courts of common pleas, to be held for the respective counties of Philadelphia, Chester and Bucks, as also for the city of Philadelphia, or from any other court of this province, by virtue of any of the said writs. And to examine and correct all and
all manner of errors of the justices and magistrates of this province, in their judgments, process and proceedings in the said courts, as well as in all pleas of the Crown, as in all pleas real, personal and mixed; and thereupon to reverse or affirm the said judgments, as the law doth or shall direct. And also to examine, correct and punish the contempts, omissions and neglects, favors, corruptions and defaults, of all or any of the justices of the peace, sheriffs, coroners, clerks and other officers within the said respective counties. And also shall award process for levying, as well of such fines, forfeitures and amercements, as shall be estreated into the said supreme court, as of the fines, forfeitures and amercements, which shall be lost, taxed and set there, and not paid to the uses they are or shall be appropriated.

And generally shall minister justice to all persons, and exercise the jurisdictions and powers hereby granted concerning all and singular the premises according to law, as fully and amply, to all intents and purposes whatsoever, as the justices of the court of King's Bench, common pleas and exchequer at Westminster, or any of them, may or can do.

Saving to all and every person and persons, his, her or their heirs, executors and administrators, their right of appeal from the final sentence, judgment or decree of any court within this province, to His Majesty in council, or to such court or courts, judge or judges, as by our Sovereign Lord the King, his heirs or successors, shall be appointed in Britain, to receive, hear and judge of appeals from His Majesty's plantations.

Provided, The person appealing shall, upon entering his appeal in the court where the sentence, judgment or decree shall be given in this province, pay all costs before that time expended in the prosecution, or defending the said suit; and shall further enter into bond, with two good and sufficient securities in the sum of three hundred pounds, to the defendant in the appeal, conditioned to prosecute the said appeal with effect within the space of eighteen months after the entry of such appeal, and to satisfy the judgment of the court from which he appeals; and further, to pay all such costs and damages as shall be adjudged to him to pay, in case a sentence, judgment or decree, pass against the said appellant, or in case he, she or they fail to prosecute their appeal with effect."

"And be it further enacted by the authority aforesaid, That the said judges of the supreme court shall have power and are hereby authorized and empowered, from time to time, to deliver the gaols of all persons which now are or hereafter shall be committed for treasons, murders, and such other crimes as (by the laws of this province) now are or hereafter shall be made capital or felonies of death as aforesaid. And for that end from time to time to issue forth such necessary precepts and process, and force obedience thereto, as justices of assize, justices of oyer and terminer, and of gaol delivery, may or can do in the realm of Great Britain."

We have referred to the short-lived Act of August 27, 1727. This act was almost a counterpart of the Act of 1722, but was designed to deprive the supreme court of the power to institute original process. Its repeal was accomplished by John Moore, the king's collector of customs at Philadel-
phia, who strongly objected to it on the ground that actions involving the revenue would thenceforth have to be tried in the county courts, the judges of which were "all merchants." This insinuation against the impartiality of the lower courts was resented by the proprietors and the governor. Nevertheless the act was repealed. Whatever may have been the intention of the Act of 1722, it would seem that the supreme court was chary of assuming original jurisdiction. Chief Justice Tilghman in *Comm. v. Smith*, 4 Binn. 117 (1811), informs us that prior to 1786 the court had, certainly for a long time, exercised no original jurisdiction except in cases of fines and common recoveries, which, though actions in form, were in substance no more than mere conveyances of record.

Two acts amending the Act of 1722 were passed prior to the revolution. By the first of these, the Act of September 29, 1759, the judges of the court of common pleas were appointed to hold the orphans' court, a duty which had for some time previously been assigned to the quarter sessions, and the judges of the latter court were not to sit in the common pleas, which was to consist of five persons. No exception was taken to these provisions, which were approved, but the proprietors strongly objected to another clause in the act which provided that the judges of the common pleas, as well as the justices of the supreme court, should hold their commissions "quam diu se bene gesserint" and be removable only on the address of the assembly. The committee of the council were strongly against this provision, not only as limiting the charter rights of the proprietors, who were therein permitted to nominate judges without limitation, but as perpetuating in the seat of justice men of secondary capacity, except the chief justice. It was further stated that in the other colonies the judges held "durante bene placita," and it was not expedient to make a change in Pennsylvania which would confer no real benefit upon the inhabitants and "excite a just jealousy in the other colonies by seeming to extend advantages to this proprietary government, which have been denied to those under his
majesty's immediate care." The act was accordingly disapproved September 2, 1760.

Another amendment to the Act of 1722 was adopted, by which the number of supreme judges was increased to four, and the removal of cases into the supreme court in suits involving less than fifty pounds, except in cases involving title to land, was prohibited under penalty, in the case of the plaintiff, of loss of costs and of the defendant of double costs. It was also provided that appeals to England should be taken only on demurrer to evidence, bill of exceptions or writ of error. This act was allowed to become a law.

An examination of the provincial commissions in the archives will show that the practice prior to the revolution was to issue to the justices of each county, the number being indefinite, a joint commission authorizing three or more of them to hold the quarter sessions, and likewise assigning any three or more of them to hold the court of common pleas.

Separate commissions were issued to the chief justice and justices of the supreme court, and a joint commission of oyer and terminer. In these commissions the time is not stated for which they are to run. The commission of the peace seems to have been filled up and renewed at first yearly, but later at longer intervals of irregular length, and it was the custom for governors to renew the commissions at, or soon after, their accession to the government. At these various renewals it may be presumed that undesirable members were dropped out. The justices of the supreme court also were recommissioned from time to time, but would seem to have held their offices until death or resignation. The real trouble seems to have been to persuade men of ability to fill the thankless positions. The assembly neglected the matter of compensation, and on Penn's second visit he seems to have himself promised the chief justice one hundred pounds a year. In 1706 the chief justice made a complaint in the council that this promise was not being

V Stat. at Large, 462.
* See examples in vol. viii and ix, Pa. Arch. (2d series).
kept, and it was proposed that the assembly should be asked to make some provision for the judges, as it was unfair to throw this expense on the proprietor. Judge Mompesson, who succeeded to the office soon afterwards, accepted, "though the present encouragement be but very slender and no way inviting." The perquisites of the court were the fees allowed by the fee bill. Those established by the Act of 1723 were four shillings for every allocatur signed, six shillings for every case brought into court by certiorari, taking bail two shillings, every judgment six shillings, every rule two shillings. As late as 1772 the salary of the chief justice of the supreme court was 200 pounds, and of the associate justices 150 pounds.

In the county courts the justices received trifling fees for various services, and the expenses of the sitting of the court were paid by the county.

The Act of January 28, 1777 (IX Statutes at Large, 29), provided that one justice should be appointed to preside in the respective courts of common pleas, quarter sessions and orphans' court, but the honorary office of president of the court had existed from the earliest times and was applied to the first in the commission, or senior justice, the same person being, in many cases, for a long series of years first in the commission. The city of Philadelphia, under its charter, had a criminal court of its own presided over by the city recorder, usually a lawyer of distinction, assisted by the aldermen. Those of the aldermen who were in the commission of the peace also sat in the county courts.

By an Act of January 12, 1705, a special court was established for the trial of negroes, consisting of two judges, specially commissioned by the governor, in the respective counties, assisted by six freemen of the county; the purpose being to obtain speedy trials and summary punishment for

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2 II Col. Rec., 247, April 17, 1706.
23 X Col. Rec., 53, Sept. 19, 1772.
24 II Stat. at Large, 233.
negro offenders, whose crimes excited some alarm in the province. This act was repealed in 1780.

By an Act of May 28, 1715, the justices of the peace were given jurisdiction to try, and finally determine all suits for debts and demands under forty shillings, and issue executions on these judgments, through the constable, by levy on the goods or attachment of the body of the defendant. The court of the city of Philadelphia for the collection of small debts was abolished, and it was further enacted that no court of the province should have jurisdiction of debts under said amount, but that the act should be the exclusive remedy. Debts for rents or contracts relating to real estate were excluded from this jurisdiction. The act was allowed to become a law, and is the foundation of the present civil jurisdiction of the justices of the peace as amplified by the Act of March 20, 1810 (P. L. 208) and subsequent acts.

As for the judges of the respective courts, to mention them all would be to give a biographical history of the province. Nearly every man of distinction at that day filled at some time a place on the bench. It was, in the lower magistracy, the stepping stone to higher office, and, with the higher officials, part of the burden and duty of government. It is interesting to note that Benjamin Franklin sat for a time in the common pleas, but was wise enough to see that the position required a special knowledge that he did not possess, and was not sufficiently interested to acquire. Except the recorders of Philadelphia, few, if any, of the judges of the lower courts had any legal training, beyond such as they acquired in the exercise of their office. In the supreme court, David Lloyd, chief justice from 1717 to 1731, had a reputation in his day as an able lawyer, but in history he is chiefly conspicuous as the spokesman of the anti-proprietary party in the assembly. James Logan, his one-time enemy, who succeeded him in the office, was the most conspicuous figure in the province in his time, excepting only Penn himself. He was not a lawyer, but was

* III Stat. at Large, 63.
talented and well educated, and had sat in the quarter sessions and common pleas of Philadelphia for years. John Kinsey, who became chief justice in 1743, was a lawyer in extensive practice, and the governor considered it a matter of congratulation that one of the legal profession had consented to take the position. At the time when Dallas' Reports begin, William Allen presided. He was the richest citizen in the province and a son-in-law of the distinguished lawyer Hamilton. Educated in London, he had filled various offices, including those of mayor, recorder of Philadelphia and judge of the common pleas, and was also one of the original trustees of the College of Philadelphia. At the revolution, Benjamin Chew, the chief justice, was displaced, but after spending fourteen years in retirement was made president of the high court of errors and appeals in 1791.

In 1698 a volume was printed in London, entitled, "A historical and geographical account of the province of Pennsylvania and of the West New Jersey in America, etc. by Gabriel Thomas who resided there about fifteen years." Regarding two of the learned professions he writes: "Of lawyers and physicians I shall say nothing, because the country is very peaceable and healthy; long may it continue so and never have occasion for the tongue of one and the pen of the other, both equally destructive to men's estates and lives; besides, forsooth, they hangman-like, have a license to murder and make mischief." Such views so far, at least, as our profession is concerned, were not uncommon among the early colonists. Many of them belonged to persecuted religious sects whose experiences with the law in their former homes were not such as to inspire pleasant sentiments towards the courts or their officers. Few were drawn from that class of society which, through birth or education, could be expected to feel or display any interest in professional learning, while those few who might have done so, were enthusiasts filled with utopian theories of government or utilitarians who regarded the lawyer as an "unproductive consumer." Nor was there anything to tempt an ambitious barrister to desert Westminster Hall for a hut
in the wilderness. The colonists were usually poor, their possession half-cleared farms, commerce was controlled by the mother country, fees were necessarily small, and the only road to professional distinction and wealth was through crown offices or successful land speculation. As, however, courts without counsel are like Hamlet without Hamlet, there are evidences that even in the earliest days there were men willing to undertake the conduct of cases.

The early records of the court of assizes of New York show unmistakably the activity of certain men who appear in so many cases that they must have been regarded as regular practitioners. In the records of the court of New Castle the following minute appears under date of November 7, 1676: 26 "Upon petition of Thomas Spry desiering that he might be admitted to plead some peoples cases in court etc. the worpp court have granted him a license so long as the petitioner behaves himself well and carries himself answerable thereto." Evidently something must have happened in 1677 to disgust the governor with the ways of the law, for on May 29th of that year the governor and council "resolved and declared that pleading attorneys be no longer allowed to practice in the government but for the depending cases," which order was read in open court at Upland and New Castle. 27 The order, however, was soon relaxed, for, on June 16th following, John Matthews was admitted to practice as an attorney at New Castle, upon taking an oath "not to exact unallowed fees, nor to take fees from both plaintiff and defendant and that he will not take any apparent unjust case in hand, but behave as all attorneys ought to do." 28 Subsequently it was ordered that the crier of the court "receive for every attorney admitted and sworn in court, 12 guilders or have a beaver." The crier no longer gets a beaver, but there is still a fee to be paid on admission by those prisoners of hope who have satisfied the examiners.

27 Hazard's Annals, 438
28 New Castle Records, p. 83.
It was the dream of Penn that in his colony the laws should be so plain and the pleadings so simple that every person could plead his own cause, and it was so provided in his laws agreed upon in England and embodied in the Act of March 10, 1683. His paternalism, and the peace-loving tendencies of his more sincere followers, tended to discourage skilled advocacy. In 1685 and again in 1686 the council promulgated laws against lawyers' fees. That of 1686 is as follows:

“For the Voyding of to frequent Clamors and manifest Inconveni-ences wch usually attend mercenary pleadings in Civill Causes, It is Enacted by ye authority aforesaid, that noe persons shall plead in any Civill Causes of another, in any Court whatsoever within this Province and Territories, before he be Solemnly attested in open Court, that he neither directly nor Indirectly hath in any wise taken or received, or will take or receive to his use or benefit, any reward whatsoever for his soe pleading, under ye penalty of 5 lb. if the Contrary be made appear.”

Neither of these acts, however, passed the assembly.

It soon became evident that lawyers could not, or would not, be dispensed with, and in 1686 David Lloyd was dispatched by the proprietor to Pennsylvania with a commission to act as attorney general of the province. The Acts of 1710 and 1715 for establishing the courts had provisions for the admission of attorneys, as also the Act of May 22, 1722, which finally became a law, and which provided “that there may be a competent number of persons of an honest disposition and learned in the law, admitted by the justices of the said respective courts, to practice as attorneys there.”

In the Act of March 30, 1722-23, for regulating official fees, the attorneys' oath is prescribed in a form very similar to that used at the present day. “Thou shalt behave thyself in the office of attorney, within the court to the best of thy learning and ability, and with all good fidelity, as well to the court as to the client. Thou shalt use no falsehood, nor delay any person's cause for lucre or malice.”

Even before this a miniature bar had sprung up among

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* Charter and Laws, 507.
* III Stat. at Large, 379.
those active in public affairs, among whom were Abraham Mann and John White, members of the assembly, and Patrick Robinson, clerk of the court, and afterwards a member of the provincial council. In 1683 John White was appointed attorney general to try a case against counterfeitters, and in 1685 Samuel Hersnet was appointed to the office. The two men, however, that stand out most prominently at this first period were David Lloyd and John Moore. The latter, who belonged to a prominent family and had emigrated to Pennsylvania from South Carolina prior to 1696, was appointed advocate of the court of admiralty by Colonel Quarry, and was afterwards attorney general. As the province grew with great rapidity others came in, and in the early part of the eighteenth century there was a considerable influx of educated lawyers. The natural result was greater precision in the pleadings and closer adherence to English forms and practice. Robert Assheton, who filled the office of prothonotary from 1701 to 1727, was a trained lawyer and an associate justice of the supreme court. From his time the indictments were scientifically prepared, and in fact all the clerical work of the court offices improved.

Nevertheless the bar must have been a small and select body, since there are recorded more than one accusation of attempts to "corner" it. In 1708 a petition was read in the council from one Joseph Heaton:

"representing that he had been sued in an Action of Trover and Conversion, in the County of Bucks, by J. Growdon, yt he had procured a writt of Error, by which the cause is to be brought before the Provincial Judges, in the said County, the 14th of this Instant; that in the meantime the said Jos. Growdon arrested him in Philadia, on the same account in an Action to which he must answer at the County Court in Philidia., on the 15th Instant, wch. two several Courts coming so near together lays the Petitr. under great hardships; he also represents that his antagonist himself is Judge of the Provincial Court, and further that he has retained all the Lawyers in the County (that have leave to plead,) against him; Whereupon he prays that the Govr. would be pleased to appoint an Impartial Judge to hear his cause, and would either assign him Counsel, or so ascertain the Provincial Court, that if he be at the Charge of procuring some from New York, he may not be disappointed.

Upon wch. Jos. Growdon himself being present, answer'd that his

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II Col. Rec., 406, 2/4/1708.
action in Bucks, and that in this County, are different; that he never retained more than one Counsell, viz: John Moore, in this cause, but that he not being able to attend, procured another to act for him; by which means without any design of his, two became Concerned in it, that it being impracticable that a man should Judge in his own cause: that part of the Petition was altogether needless."

It was resolved that the petitioner be left to find his own counsel, and Yeates, the second judge, was assigned to hear the case.

In the following year Francis Daniel Pastorius and Johannes Jawert petitioned the council against proceedings in ejectment brought by one Sprogel to recover the estates of the Frankfort Company, an association of German purchasers of land, averring that Sprogel as part of his "abominable plot did fee all the known attorneys or lawyers of this province either to speak for him or to be silent in court, in order to deprive the petitioners of all advice in law." Upon examining the petitioners in the council David Lloyd was declared "the principal agent and contriver of the whole," and steps were taken to protect the purchasers. The case is reported in Pennypacker's Colonial Cases with an account by Pastorius of the whole nefarious transaction.

In Lyle v. Richards, 9 S. & R. 322, Chief Justice Tilghman remarks that there were few lawyers of eminence in the province prior to Tench Francis, although there were never wanting strong minds well able to conduct the business of the courts, and the fact that the leading lawyers of the following generation received their training in the Inns of Court led them perhaps to look down on their predecessors, some of whom were in extensive practice that included the neighboring colonies. One name, however, stands at the head of the early bar, that of the brilliant Andrew Hamil-

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*Heather v. Frankfort Co., Penny. Col. Cas., p. 142. That the "cornering" of the bar was not a new experiment would appear from an incident mentioned by Barrington in his "Observations on the Statutes," p. 294n. "There is also * * * a petition of Robert Pickrell, exhibited to the king in parliament the second year of Richard the Second; by which he complains that Alice Perrers had retained all the advocates in Westminster Hall, so that he could have no advic*-; "si il ne donneroit si grande summe d'or, quil ne poit attaindre".
ton. The history of Hamilton is worth studying, as he is the only American lawyer of his generation that enjoyed an international reputation. The most interesting personal episode in his career was the part he took in the erection of Independence Hall, which was built from plans prepared by him and under his personal supervision. To the legal profession he is best known for his brilliant and successful defence of the printer, Peter Zenger, tried for seditious libel, a case of real historical importance as well as contemporary interest. In this case, tried in the supreme court of New York in 1735, Hamilton carried the jury against the instructions of the court and obtained the defendant's acquittal by a bold address in which the liberty of the press was asserted with unprecedented vigor. The doctrines which he advanced, regarded as unsound at the time, have since become indelibly impressed upon English and American law, and the trial deserves careful reading on account of the light that it throws on contemporary political conditions and the effect that it produced on the law of libel.34

As the century advanced it became the general custom, for those who could afford it, to send their sons to be educated in the law at the Inns of Court. This was more prevalent in the Southern and Middle, than in the New England, colonies. From 1760 to the end of the revolution there were more than one hundred American students of law in London, of whom forty-seven were from South Carolina, twenty-one from Virginia, sixteen from Maryland, eleven from Pennsylvania, five from New York and the rest from the other colonies, no other colony than those named having more than two students.35 Many of these men attained great distinction in professional and public life. Among those from Pennsylvania were Chief Justices Benjamin Chew, Thomas McKean, Edward Shippen and William Tilghman; Justice Jasper Yeates; Presidents of the Supreme Executive Council Joseph Reed and John Dickinson, as well as such distinguished lawyers and citizens as Nicholas Waln,
Edward and Richard Tilghman, William Rawle, Jared Ingersoll and Peter Markoe. It is not to be supposed that the education afforded by the Inns of Court corresponded to that given in a modern law school. Everything depended on the diligence of the student himself, and admission as a barrister came in due course after eating the required number of dinners regularly during the appointed terms. But the atmosphere and associations were conducive to study, while inspiration was to be drawn from the courts at Westminster, where the student attended and took notes of the arguments and decisions. Such note books were, in those days of scanty reporting, the treasured possessions of lawyer and judge and carefully consulted in the preparation of important arguments and decisions. In *Clayton v. Clayton*, 3 Binney, 476 (1811), the manuscript notes of one of these students was cited in the supreme court. The case was one involving the question as to whether certain devisees under a will took an estate in fee or for life, there being no words of inheritance, but a direction to divide. Mansfield's decision in *Wigfall v. Brydon*, 3 Burr., 1895, was cited in favor of a fee. It being difficult to reconcile this decision with other authorities, the case was explained as turning on a direction to sell and divide, which appeared from the manuscript notes of the case of *Goodright v. Patch*, decided in the King's Bench, June 20, 1773, taken by Edward Tilghman while a student at law. So, too, in the political capital of the kingdom, the student studied the conflicting doctrines of the Tory and the Whig and prepared his mind for the momentous changes about to occur in his home across the sea.

As the revolution approaches we find an able group leading the bar, Moland, Chew, Ross, Waln, Tilghman, Galloway and Dickinson. Time was no object to the courts in those peaceful and slumberous days. In a manuscript book of reports giving some cases of that time the reporter says, in noting *Haldane v. Duffield*, April Term, 1768, "the remainder of Mr. Chew's argument I did not hear nor did

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*Keith's Provincial Councillors, 328.*
I wait Mr. Dickinson’s and Mr. Tilghman’s conclusion, this case having continued twelve hours.” In 1774 Chew succeeded Allen as chief justice, and in September of that year hospitably entertained the members of the continental congress then assembled in Philadelphia. Washington and John Adams both mention dining with him on the twenty-second of that month. Adams writes in his diary:

“Dined with Mr. Chew Chief Justice of the Province with all the gentlemen from Virginia, Dr. Shippen, Mr. Tilghman and many others. We were shown into a grand entry and staircase and into an elegant and magnificent chamber until dinner. About 4 o’clock we were called down to dinner. The furniture was all rich. Turtle and every other thing, flummery, jellies, sweetmeats, of 20 sorts, trifles, whipped sillage, floating islands, fools, etc., and then a dessert of fruits, raisins, almonds, pears, peaches. Wines most excellent and admirable. I drank Madeira at a great rate, & found no inconvenience in it.”

The stately mansion of the chief justice yet stands, the fine old colonial hospitality a treasured memory. The smoke and dust of fratricidal war darkened it, its walls were battered with shot and its floor stained with blood; bench and bar were scattered, some to attain distinction in the camps and councils of the new nation, others to live obscurely through weary years of suspicion or to fly from the country of their birth as attainted traitors, their lands forfeited and their names soon forgotten.

William H. Loyd, Jr.

“Keith’s Provincial Councillors, 329."